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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES RESPECTING POSSIBLE MOOTNESS

The Solicitor General respectfully calls to the Court's attention certain new facts which raise a possible question of mootness in this case, now awaiting argument on writ of certiorari to the United States Court of Appeals for the Second Circuit, 352 U. S. 820. Although, in our judgment, these new facts do not render the case moot, we think it appropriate to inform the Court of these developments and of our views as to their effect, if any, on the status of the case.

The pertinent facts, upon which petitioner's conviction for contempt by the United States District Court

for the Southern District of New York was based, are set forth in the Statement in our Brief in Opposition (Br. Opp. 4–13). They may be more briefly summarized as follows:

Petitioner, the Secretary-Treasurer of Local 269 of the International Brotherhod of Teamsters, was subpoenaed to appear before a grand jury investigating racketeering in the garment and trucking industries, and to produce the books and records of the union. He did not produce the books and records, stated that he did not have possession of them, and declined on the ground of self-incrimination to answer any questions pertaining to their whereabouts or as to who was their custodian. The District Court, after a hearing, ruled that the privilege did not attach to these questions and ordered him to answer. The petitioner refused to answer, even when the court itself put the questions to him, and the court held him in contempt (Br. Opp. 3–4). The District Court thereupon committed petitioner (R. 41–42) "to be held in close continement for a period of six months" with a proviso that he might "purge himself of said contempt by appearing before the United States Grand Jury and answering said questions as directed."

After the petition for certiorari in this case had been granted (on October 8, 1956), on or about November 8, 1956, the United States Attorney was informed that the books and records of the union had just been seen in the office of the union, in petitioner's custody as Secretary-Treasurer. Since the object of the original subpoena had been to obtain the books

for the then pending investigation, and not to question petitioner, the United States Attorney, on the basis of the information he had on that date, issued, on November 8, 1956, a new subpoena duces tecum to petitioner as an officer of the union, calling for production of the books. The subpoena, returnable the same day, was not complied with. Petitioner explained that to produce the records might "prejudice his case in the Supreme Court." He did not deny that the books and records were then in his custody.

The District Court issued an order requiring petitioner to show why he should not be held in contempt for his noncompliance with this second subpoena. On November 14, 1956, argument was heard by the District Court on the show cause order, during which counsel for petitioner sought to avoid compliance with the subpoena on the ground of the pendency of the instant case in this Court. Again, there was no denial of petitioner's custody at that time. The District Court indicated its agreement with the government's position that the books should be produced without qualification. Defense counsel finally agreed that petitioner would produce the books and records for the grand jury. After this had been done, the second application to hold petitioner in contempt was dismissed on the government's own motion on November 27, 1956.

Under these circumstances, there is a question as to whether the instant case has become moot. Although petitioner was ordered imprisoned for his contumacious refusal to answer questions concerning books and records of which he would be the normal

custodian, and although he did not thereafter purge himself as provided in the order by answering questions, the objective of the first subpoena, and of the questions directed to petitioner in connection therewith, has been accomplished since the books have now been produced. The government concedes that, with the books already in its hands, if questions were now to be put to petitioner concerning the whereabouts of the books his claim of privilege with respect thereto would be in a different posture than in the original proceeding now before the Court.

If this proceeding had been for civil contempt, instituted for the sole purpose of coercing the petitioner into future compliance with the demands of a subpoena, the cause would be moot. Coercive sanctions imposed in civil contempt proceedings are wholly remedial in nature, serve only the purposes of the complainant, and are not intended as a deterrent to offenses against the public. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191; *Maggio* v. *Zeitz*, 333 U. S. 56, 67–68; *Penfield Co.* v. *S. E. C.*, 330 U. S. 585, 590; *Nye* v. *United States*, 313 U. S. 33, 42; *McCrone* v. *United States*, 307 U. S. 61, 64; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442. And a civil contempt order has served its purpose when its objectives have been achieved either through belated compliance by the contemnor, the termination of the proceedings to which the civil contempt proceedings are ancillary, or some other fact which renders the order no longer purposeful. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 295; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418,

451; *United States* v. *International Union, United Mine Workers of America,* 190 F. 2d 865, 874 (C. A. D. C.).

It is equally clear that, had the original order provided for no more than a fixed term of imprisonment for the completed acts of disobedience, it would have been wholly criminal in nature, and the proceedings in this court would not be affected by any change of circumstances occurring after the completed contempt. *Gompers* v. *Bucks Stove & Range Co., supra* (221 U. S. at p. 442); *Parker* v. *United States,* 153 F. 2d 66, 70–71 (C. A. 1). We do not think this result is altered by the fact that the order gave this petitioner opportunity to answer the refused questions and thus to exonerate himself from further liability to imprisonment. The controlling fact is that he was being punished for his willful refusal to answer, and that he did not elect to purge himself in the manner specified in the order. See *Grant* v. *United States,* 227 U. S. 74, 78.[1]

It may well be that the contempt order, although intended primarily as punishment, was also intended in some measure as a coercive sanction to impel future compliance. Cf. *United States* v. *United Mine Workers of America, supra* (330 U. S. at pp. 298–299); *Lopiparo* v. *United States,* 222 F. 2d 897 (C. A.

[1] For other cases in which criminal contempt sentences provided for a fixed term or until such time as the defendant might purge himself, see, *Field* v. *United States,* 193 F. 2d 86, 88; 193 F. 2d 92, 94; 193 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 894; *Lopiparo* v. *United States,* 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916; 222 F. 2d 897 (C. A. 8).

8). The contempt order might thus be said to sound both in criminal and civil contempt. It was, however, primarily punitive and "the criminal feature of the order is dominant and fixes its character for purposes of review". *Nye* v. *United States,* 313 U. S. 33, 42–43; *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 110; *Grant* v. *United States, supra.* Since petitioner did not purge himself under the contempt order, the criminal feature of that order (*i. e.,* petitioner's liability to imprisonment) survives. See *Lopiparo* v. *United States,* 222 F. 2d 897 (C. A. 8), where Lopiparo was found in contempt for not obeying an order to deliver corporate records to the grand jury, and was sentenced to 18 months' imprisonment "or until the further order of this Court should he produce before the grand jury the aforesaid records before the expiration of said sentence, or the discharge of said grand jury". 222 F. 2d at p. 897. The Court of Appeals held that his sentence did not terminate with the discharge of the grand jury since he had not pro-

duced the records in accordance with the condition of the order. Similarly here, although petitioner may, in practical effect, have lost the power to purge himself of the contempt for refusal to answer questions, his completed act of disobedience remains subject to punishment. *United States* v. *United Mine Workers of America, supra* (330 U. S. at p. 294); *Gompers* v. *Bucks Stove & Range Co., supra* (221 U. S. at p. 451).[2]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY, III
Assistant Attorney General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

DECEMBER, 1956.

[2] On remand, the District Court may modify the sentence, if it is appropriate to do so. Rule 35, F. R. Crim. P.

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